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Thursday, August 23, 2001

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

LAWRENCE D. HULSE,

No. 01-11419

[Debtor](#) (s).

### **Memorandum re [Confirmation](#) of [Plan](#)**

Prior to the commencement of this [Chapter 13](#) case, an arbitrator ruled that even though debtor Lawrence Hulse held record title to the real property at 155 N. San Pedro Road, San Rafael, California, objecting [creditor](#) Marshall J. Didier held an "actual 75% ownership interest" in the property. The arbitrator's award was confirmed by the state court. The cornerstone of Hulse's proposed plan is avoidance of the state court judgment as a preference. Didier objects. Since it is clear that the judgment is not avoidable, the objection will be sustained. In order for a transfer of an interest in real property to be avoidable as a preference, the interest must have belonged to the debtor prior to transfer. Where the debtor possessed only legal title and not equitable ownership, the property was not property of the estate and an act to establish that fact, even if done within the preference period, is not subject to avoidance as a preference. *In re Gurs*, 34 B.R. 755, 757 (9<sup>th</sup> Cir.BAP 1983). As the court there noted: To argue otherwise confuses avoidance of a transfer of an interest in the debtor's property with avoidance of an act that perfects, as against potential bona fide purchasers, a [claim](#) of ownership. Section 547 permits the avoidance of the former not the latter. [Emphasis in the original] Nor is a decree regarding ownership avoidable under § 522(f) of the Code. *In re Pribonic*, 70 B.R. 596, 605-06 (Bkrtcy.W.D.Pa.1987). Since the

state court judgment is not avoidable, Hulse's plan is not feasible and cannot be confirmed. Didier's objection will accordingly be sustained. Hulse may have leave to file an amended plan. Counsel for Didier shall submit an appropriate form of order.<sup>(1)</sup>

Dated: August 23, 2001

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Alan Jaroslovsky

U.S. [Bankruptcy Judge](#)<sup>i</sup>

1. The court recognizes that issues remain as to whether the damages portion of the state court decree is avoidable to the extent it created a [lien](#)<sup>i</sup> on Hulse's 25% interest in the property, and whether the voluntary encumbrance by Hulse is chargeable against the whole property or just his 25%. The court must address these issues in order to decide if relief from the [automatic stay](#)<sup>i</sup> should be granted to Didier. This will be the subject of a separate memorandu

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